and damages incident to making the sale, which sale operated, under the laws of said State, as full payment of the State's demand for taxes, and that this course is universally pursued in said State and was pursued with reference to all other taxpayers in said State and in Tunica County, Mississippi, for the same year and under the same assessment, but that under the direction of the Attorney General, the tax collector refused so to sell the land of these appellants upon which the taxes were not paid, and instead of so making such sale, filed this action, which course of conduct resulted in the unlawful selection of these apellants by said authorities and unlawfully discriminated against them and deprived them of the benefit of the discharge of their liability for said taxes, by a sale of their property upon which the taxes were unpaid, although the property of all other taxpayers was so sold and the liability of other taxpayers thereby discharged, and that this discrimination against these appellants was contrary to and in violation of the statutes of said State and the aforesaid provisions of the Constitution of the United States.

The action was defended on the additional ground, that Section 4256, Code of 1906, 6887, Code of 1917, 8189, Code of 1927, makes no provision of the means whereby personal jurisdiction of any property owner can be obtained, that no such jurisdiction was obtained, and that, inasmuch as the Chancery Court has uniformally been held to be without the power to value, assess or levy taxes against property, that statute, construed as imposing personal liability for the payment of taxes, violates the Constitution of the United States, in that so enforced, it would deprive and did deprive the appellants of their property without due process of law.

While the appellants attacked the validity of the assessment of the land upon which the taxes were not paid, even

as an assessment *in rem*, the Supreme Court of the State of Mississippi held the assessment to be valid, which forecloses any consideration of that question in the Supreme Court of the United States.

The complaint of the appellants as to depriving them of their property without due process of law refers to the tract of land upon which they paid the taxes and which land was attached for the satisfaction of the taxes alleged to be due against the land on which the taxes were not paid. There was no complaint, in the court below, and there is no complaint in this Court, that this proceeding which is asserted to have deprived the appellants of their property without due process of law, relates in any way to the tract of land upon which the taxes were not paid. Since the Supreme Court of the State of Mississippi has decided the assessment against the land on which the taxes were not paid was valid, as an assessment *in rem*, it must be conceded that no question can be raised with reference to the loss of that property, as depriving the appellants of it without due process of law.

The appellants contended and now contend, that, inasmuch as Section 4255, Code of 1906, page 1162, Section 6886, Hemingway's Code of 1917, Vol. II, page 2822, limits the lien of the tax assessment to the particular property which constitutes the immediate subject of assessment, there is no means by which the alleged debt may be satisfied out of the property on which the taxes were paid, except to go through the personal liability of the appellants, as a medium, and that since the action of the assessing authorities did not constitute a judgment imposing personal liability, the tract of land on which the taxes were paid cannot be subjected to the payment of the demand.

Section 4255, Code of 1906, page 1162, Section 6886, Hemingway's Code of 1917, Vol. II, page 2822, reads as follows:

"6886 (4255). Taxes a lien, from what date.—Taxes, both State and county, assessed upon lands or personal property, shall bind the same, and be entitled to preference over all judgments, executions, incumbrances, or liens, whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed, from the first day of February of the year in which the assessment shall be made; and no property shall be exempt from distress and sale for taxes. And it shall not be necessary to the validity of an assessment, or of a sale of land for taxes, that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold, or whether wrongfully assessed, either to a person, or to the State, or any county, city, town, or village, or subdivision of either."

The Supreme Court of the State of Mississippi, in the majority opinions, ruled against and denied the claim of the appellants, that to subject the land upon which the taxes were paid to the satisfaction of the demand for the taxes assessed and levied against the land, which were not paid, without notice, summons, appearance or otherwise submitting to the jurisdiction of the assessing authorities, prior to or during the assessment proceedings, so as to warrant the imposition of personal liability, was to deprive the appellants of their property, the land upon which the taxes were paid, without due process of law.

Some of the authorities which the appellants believe sustain this claim are:

Dewey v. *Des Moines,* 173 U. S. 193, 43 Law. Ed. 665.

Pennoyer v. *Neff,* 95 U. S. 714.

Mexican Central Railway Company v. *Pinkney,* 149 U. S. 194.

McCulloch v. *Maryland,* 4 Wheat. 316, 4 Law. Ed. 579.
Cleveland, Painesville, Ashtabula Railroad Company v. *Commonwealth of Pennsylvania,* 15 Wall. 300, 21 Law. Ed. 186.
Cooley on Taxation, Vol. I (Fourth Edition), pages 220, 221 and 223.
State Tax on Foreign-Held Bonds, 15 Wall., 300, 21 Law. Ed. 179.
Pendleton v. *Virginia,* 65 S. E. 536.
Winchester v. *Stockwell,* 74 Atl. 249.

The Supreme Court of Mississippi, in the majority opinions, ruled against and denied the claim of the appellants, to the effect that the State of Mississippi does not possess the power to impose personal liability, by its statutes, upon non-resident property owners of the State, for taxes assessed against lands located in said State and owned by such non-residents.

Some of the authorities which the appellants conceive to sustain their claim are:

New York v. *McLean,* 57 N. Y. App. Div. 601, 68 N. Y. Sup. 606, 63 N. E. 380.
Maltbie's Case, 199 N. E. 389.

The Supreme Court of the State of Mississippi, in the majority opinions, ruled against and denied the claim of the appellants, that they were denied the equal privileges and immunities of the citizens of the State of Mississippi and the equal protection of the laws of the State, in violation of the Constitution of the United States, in that they were selected out and made the victims of a wilful discrimination and denied a substantial right, to have their land which was the subject of assessment of taxes here involved, for the purpose of liquidating whatever debt may

have been imposed by the statute upon which the action is based, as was done with reference to all other taxpayers of the State of Mississippi in like circumstances. The cases upon which the appellants rely to sustain this claim are:

Yick Wo v. *Hopkins,* 118 U. S. 356, 374, 30 Law Ed. 220 to 228.
Henderson v. *Mayor of New York,* 92 U. S. 259.
Chy Lung v. *Freeman,* 92 U. S. 275, *Ex Parte Virginia,* 100 U. S. 339.
Neal v. *Delaware,* 103 U. S. 370.
Soon Hing v. *Crowley,* 113 U. S. 703.

According to the decisions of the Supreme Court of the State of Mississippi, the right to have the land against which the taxes here involved were assessed sold for the purpose of liquidating this debt, is a valuable and substantial right.

The case which supports this contention is:

Yazoo Delta Mortgage Company v. *Lumbley,* 116 So. 95, 149 Miss. 864, at page 872.

The Supreme Court of the State of Mississippi has held that the sale of land which is the immediate subject of taxation operates as a discharge of the debt imposed by the section of the Code under which this action is prosecuted.

The cases which support this contention are:

Carrier Lumber & Manufacturing Company v. *Quitman County,* 156 Miss. 396, at page 401.
McLaren v. *Moore,* 60 Miss., at page 382.

The Supreme Court of the State of Mississippi ruled against and denied the claim of the appellants, to the effect that, so to construe the statute on which this suit is based as to make the roll conclusive as a personal judgment, notwithstanding it makes no provision of the means whereby

personal jurisdiction of the property owners can be obtained and notwithstanding no such jurisdiction of these appellants was obtained prior to or during the proceedings looking to the alleged assessment of taxes demanded, and held that the due process of law requirement of the Fourteenth Amendment of the Constitution of the United States was met by affording the appellants a hearing in the Chancery Court in which the action was commenced, in the face of the settled, continuous and unreversed course of the decisions of that court, that the chancery courts of said State have no power to value or assess property or to levy or collect taxes, which holding of said court had the necessary and legal effect to make the assessment roll a conclusive judgment, imposing personal liability for the payment of said taxes, without affording the appellants an opportunity to be heard on the question of personal liability and the value of the land.

The authorities on which the appellants rely to support their claim, that the chancery court hearing on these questions is no hearing at all, which has the effect of making the assessment roll a conclusive judgment, are:

State v. *Tonella*, 70 Miss. 701, at pages 709 to 714.

Brooks v. *Shelton*, 47 Miss. 243, at page 247.

Ex Parte Wimberly, 57 Miss. 437, at page 447.

Railroad Company v. *Adams*, 73 Miss. 648, at pages 659 to 662.

Thompson v. *Kreutzer*, 103 Miss. 388.

Johnson v. *Puffer Manufacturing Company*, 111 Miss. 240, at pages 242 and 243.

Mississippi Railroad Commission v. *Western Union Telegraph Company*, 107 Miss., page 442, at page 452.

Griffith's Chancery Practice, Section 441, page 466.

Preston v. *Sturgis Milling Company*, 183 Fed. 1.

The authorities on which the appellants rely to sustain their claim, that taxes constitute a lien on no other property than that which is the immediate subject of assessment are:

Anderson v. *State*, 23 Miss. 459, at page 475.
Bailey v. *Fuqua*, 24 Miss. 497, at page 499.
Cooley on Taxation, Vol. IV (Fourth Edition), Sections 1230, 1235.

Respectfully submitted,

GEO. BUTLER,
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Counsel for Appellants.

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No. 298

In the Supreme Court of the United States

OCTOBER TERM, 1933

S. M. NICKEY, W. E. NICKEY, MRS. ORPHA L. NICKEY, ET AL, Appellants

vs.

STATE OF MISSISSIPPI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

W. E. GORE,
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Attorneys for Appellants.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 298

S. M. NICKEY, W. E. NICKEY, MRS. ORPHA L. NICKEY, ET AL, Appellants

vs.

STATE OF MISSISSIPPI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

This case is here on appeal, Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat., 937, being Section 344, U. S. Code, Ann., Title 28, to review the judgments of the Supreme Court of the State of Mississippi, rendered January 30, 1933, R., 72, March 20, 1933, R., 80, and April 3, 1933, R., 81, based upon the opinions of the majority of the Court, as written by Justice Anderson, R., 53, and Chief Justice Smith, R., 75 and 80. The case has not yet appeared in the official reports. It is reported in 145 So., 630, 146 So., 859, and 147 So., 324. The dissenting opinion of Justice Griffith appears at page 638

145 So., and in the printed record, at page 71. The dissenting opinions of Justice Ethridge appear at page 634, 145 So., and page 859, 146 So., and at pages 62 and 77, of the printed record.

QUESTIONS INVOLVED

The questions involved are:

1. Whether Section 4256, Code of Mississippi of 1906, page 1162; 6887, Hemingway's Code of 1917, Vol. II, page 2882; 8189 Hemingway's Code of 1927, Vol. II, page 3238, confers, in view of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, jurisdiction on the taxing authorities of the State of Mississippi to impose personal liability upon non-residents of the state, for the payment of taxes assessed and levied on lands owned by such non-residents, where such non-residents were not personally served with process and did not otherwise appear or submit themselves to the jurisdiction of the authorities empowered, and charged with the duty, to make tax assessments, prior to, or at any stage of, the assessment proceedings?

2. Whether, conceding that the State of Mississippi possesses this power, that section of the Code, as construed by the Supreme Court of Mississippi, violates that clause of the Constitution of the United States, in that, it provides no means by which jurisdiction of such land owners may be obtained, so as to require them to appear during the assessment proceedings, but thereafter such non-resident landowners may be subjected to

suit and compelled to respond, although no jurisdiction was obtained until after the proceedings became final, and other land of such non-residents may be sold to satisfy the demand of the state for such taxes, without depriving them of their property in the land attached and sought to be sold, without due process of law?

3. Whether, by resorting to the state court to obtain relief from the imposition of such personal liability and the attachment of the other property of such non-residents, through the medium of such personal liability said to be imposed by the statute, the appellants thereby in any manner consented, or rendered themselves liable to a judgment against them for any personal liability which may be satisfied by a sale of their other property in said state?

4. Whether the attorney general of the state and the tax collector of Tunica County, by agreement, can single out, and discriminate against, the appellants by refusing to sell their delinquent tax land to pay their alleged debt, and sue them by attachment of land on which they had paid all taxes and sell it for taxes assessed against their delinquent tax land, when all such land of all other taxpayers in the state and in Tunica County are sold each year, and were sold in the same year, by the tax collectors of the counties, which sale paid the debts of all others so situated, without violating Section 2, Article IV, and the Fourteenth Amendment of the Federal Constitution, guaranteeing to the citizens of each state all privileges and immunities of the citizens of the several states, and forbidding any

state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or to deny to any person within its jurisdiction the equal protection of the laws, in view of the provisions of Section 4326, Code of 1906, pages 1182, 8245 Hemingway's Code 1927, Vol II, page 3265, and Section 6962, Hemingway's Code 1917, Vol. II, pages 2865, 8247, Hemingway's Code 1927, Vol. II, page 3266, which prescribe the manner in which land shall be sold for the delinquent taxes thereon and make it the mandatory duty of the tax collector of the county to sell the land of delinquent taxpayers, or so much or such parts thereof, as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash, when tax sales under those statutes are held by the State Supreme Court to have the legal effect to discharge the owner from liability for the payment of the delinquent taxes due against the property, and when that Court holds that the right to have such land so sold is a valuable and substantial property right of such a taxpayer?

5. Whether, under Section 2255, Code 1906, page 1162, 6886, Code 1917, Vol. II, page 2822, which provides that "all taxes assessed shall be a lien upon and bind the property assessed" the land attached can be sold to pay the taxes on the other land, except by establishing personal liability as the means by which it may be taken?

Copies of the four sections of the Code to which reference is made are printed in an appendix to this brief.

The majority decision of the Supreme Court of Mississippi held that the first named statute could, and did confer jurisdiction on the taxing authorities of Mississippi to impose personal liability upon such non-residents of the state; that said statute did not violate the Constitution of the United States and did not deprive the appellants of their property without due process of law; that, by resorting to the state court to obtain relief from the imposition of such personal liability, the non-resident appellants thereby consented and rendered themselves liable to a judgment against them for a personal liability which the statute was held to impose and that such liability could be satisfied by sale of their other property in the state, and that there was no discrimination against them or denial or abridgment of the privileges and immunities of the citizens of the several States or of the citizens of the United States and no denial of the equal protection of the laws to these appellants.

The majority decision held that the defendants were personally liable for the taxes assessed without notice and that the attached lands could be sold, but bond having been given to release the attachment, judgment was rendered against the appellants and their sureties, instead of adjudging that the land be sold to pay the debt.

In the Syllabus of the case, 145 So., 630, which, in Mississippi is prepared by the court and states the law of the case, it is said: "Statute making a tax a debt due by taxpayer for which action may be brought held

not invalid as depriving taxpayer of property without due process of law (Code 1930, Sec. 3122; Const. U. S. Amend. 14; Const. Miss. 1890, Sec. 14).

"Code 1930, Sec. 3122, providing that every lawful tax assessed 'shall be a debt due by the' taxpayer, whether properly assessed or not, and authorizing recovery thereof by action, does not violate due process clause of both State and Federal Constitution, in view of further provision that in all actions for recovery of ad valorem taxes, the assessment roll shall only be prima facia correct, which furnishes the taxpayer with an opportunity for hearing to contest the validity of the tax.

"Non-resident defendants who appeared and answered bill of complaint (and sought relief from the attachment for taxes imposed without notice, and from the assessment thereof, as imposing personal liability) were before court, same as residents, and same as if they had been personally served with summons. (Matter in parentheses supplied).

"Proceedings by tax collector of county, exhausting statutory remedies provided for collection of taxes held not condition precedent to action by state to collect taxes as debt against taxpayer (Code 1930, Sec. 3122)."

In the Syllabus of the case, 146 So., 859, it is said: "Taxes may be collected by judicial process when authorized by Legislature (Code 1930, Sec. 3122).

"Personal liability against non-resident for taxes meets due process requirements if, before obligated to pay tax, non-resident has been given appropriate notice and opportunity to contest tax (Code 1930, Sec. 3122).

"Where non-residents appeared in state's action for collection of taxes as debt, and submitted to jurisdiction, and had opportunity for hearing, requirements of due process were met (Code 1930, Sec. 3122."

STATEMENT OF THE CASE

This is an attachment in chancery, under Code of Mississippi in 1930, Section 173, which vests jurisdiction in the chancery court of attachment suits founded upon any debt, against any non-resident who owns land within the state. It was filed by the state in the chancery court of Tunica County, on the relation of the Attorney General.

The bill averred that the defendants were non-residents of Mississippi. A. B. Nickey was dead at the time the taxes were said to have been assessed. None of the living defendants, the appellants here, or A. B. Nickey, was, or ever had been, a resident of Mississippi. S. M. Nickey and W. E. Nickey were residents of Tennessee and Mrs. Orpha L. Nickey was a resident of California.

The bill demanded unpaid taxes for 1928 on the land described at the bottom of page 1, of the printed record. The action is based on Section 8189, Code of 1927, which appears in the Appendix. The section makes taxes a debt and provides that they may be recovered

as such, by action. As a means to satisfy the alleged personal liability of the non-residents, the land described at page 3 of the printed record was attached. The taxes on that land were paid. Both tracts were owned by the defendants.

The complainant pleaded the assessment roll as a judgment imposing personal liability on the defendants. The taxes were alleged to have been a debt due by the defendants, to the state, county, levee and drainage districts. R., 2 and 3. The assessment roll upon which the bill is based appears at page 50a of the printed record. The advertisement of the sale of the lands, by the tax collector appears at page 5 of the printed record. This position of the complainant is stated in the bill, and there is a further statement of the position of the complainant at page 29 of the record, to the effect that the complainant did not claim that the assessment roll constituted a personal judgment, that when the appellants owned and operated the land, they took it with full knowledge of the laws of Mississippi, relating to their right to be heard, when equalization took place and were charged with knowledge of the law which gave them the right to be heard at specified times. The second contention, as there stated, is, that, even though they were ignorant of the law, the complainant would not attempt to enforce the assessment as a personal judgment, but that this suit was brought so as to give the appellants their day in court.

Although the assessment roll was pleaded as a conclusive judgment, this position was abandoned by the

complainant and it thereafter relied on its right to fix the liability, which involved valuation, assessment, equalization and levy of taxes by the proceeding in the chancery court. Therefore, the suit was brought on a cause of action which did not exist at the time it was filed. The Supreme Court did not hold that the personal liability was imposed when the assessment and levy were made, but held that the due process of law requirement of the Fourteenth Amendment was met in affording the appellants an opportunity to be heard on the questions of value and assessment, and equalization as related to other property in the county and state, at the trial in the chancery court.

The amount demanded of the defendants and the sureties on the bond releasing the attachment, in the chancery court, was $7483.22, and was composed of drainage district charges $3835, costs and damages $692.58, and the balance state, county and levee district taxes, R., 4, 7, and 46. The Supreme Court reversed the decree as to the drainage taxes, costs and damages, and entered judgment for the other taxes demanded.

The complainant alleged that the land on which the taxes were not paid was chiefly valuable on account of the timber, and that the value of the land, exclusive of the timber, was not sufficient to pay the taxes then due. R., 2. The bill prayed an injunction against cutting the timber on both tracts of land, so as to preserve the means by which the demand could be satisfied.

The assessed value of the land on which the taxes were not paid, excluding the value of the timber, was

$21305. R., 50a. The attention of this court is invited at this time, to the fact, that the bill must stand on the allegation, that land of a value of $21305 is insufficient to liquidate a debt of $2975.54, for the State Supreme Court held that the costs, damages and drainage district taxes could not be recovered in this action and that the defendants had the absolute right to cut the timber, even though none of the taxes had been paid. The statute makes the assessment roll prima facie correct, on which the complainant might have rested the case but for the allegation of the bill, to the effect, that the land was not worth $2975.54, which was a percentage of the base, $80851, including the assessed value of both the land and timber; R., 50a, when the value of the land excluding the timber, was fixed by the roll at $21305, nearly ten times the taxes which the complainant was entitled to recover, as held by the State Supreme Court. It is submitted, possibly out of order, that the defendants were not required to go forward with proof of value and whether legal equalization in relation to the property of other taxpayers had been made. So, whatever advantage the roll afforded was lost by the complainant, and the case was submitted without any proof whatever, of value or equalization.

In respect to the questions now before this Court, the defenses were:

1. That the defendants in the chancery court were not personally summoned to appear in the assessment proceedings, that they had no legal notice, and made no appearance at any stage thereof, and that they did not otherwise submit themselves to the jurisdiction of the assessing authorities, so as to render valid a personal judgment, and that the rendition of any personal decree in the chancery court, against them would constitute taking the property attached without due process of law, in violation of the constitutions of the state and of the United States. R., 9 and 10.

2. That the legislature was without power to enact, and the state without power to enforce, a statute permitting a personal judgment to be taken against a non-resident of the state, without personal service of process, commanding his appearance during the assessment proceedings, and that, inasmuch as the assessment did not constitute a personal judgment, the levy was void. R., 10 and 11.

3. The defendants denied that their property was of insufficient value to satisfy the demand, or that the state or its sub-divisions would suffer irreparable loss or that any tax for which they were liable personally was unpaid. R., 12, Par. 12, 13, 14 and 16.

4. The defendants denied that the land was chiefly valuable for its timber. R., 12, Par. 15.

5. That the complainant had no right to attach or sell the land described at page 3 of the printed record, to collect the taxes on the land described at page 1 of the printed record. R., 12 and 13, Par. 17.

6. That for the attorney general and tax collector to single out the defendants and refuse to sell their land as the means to pay the taxes, when the land of all others was sold for taxes and their liability discharged thereby, constituted a discrimination against the defendants, in violation of the Constitution of the United States.

7. The appellants did not plead that the chancery court had no power to assess, or equalize the value of the property of appellants, in relation to the value of other property in the county and state, or to pass on the intrinsic value thereof, but defended the suit on this ground in the chancery court, when counsel made the announcement shown at page 29 of the printed record, that "We are bringing them in here now to give them their day in Court." This statement of the complainant is not based on any averment of the bill. On the contrary, it is inconsistent, and in direct conflict with the averment of the bill, R., 2 and 3, that the assessment roll imposed personal liability on the appellants.

The defense was vigorously urged on appeal to the State Supreme Court.

The validity of the assessment was challenged as an assessment in rem, also, by the defendants, but the

State Supreme Court has settled this question against the appellants.

The complainant set up, as an excuse for the oppressive conduct of, and collusion between, the attorney general and the county tax collector, in discriminating against the appellants here, by refusing to sell the delinquent tax lands to pay the debt, that they were the only lands from which the merchantable timber had been removed between the date of the assessment and the date set for the tax sale. The State Supreme Court held that the drainage charges, and the costs and damages could not be recovered at all and that the appellants had an absolute right to remove the timber. Therefore, this discrimination stands without any justification or excuse whatever.

SPECIFICATION OF ERRORS ASSIGNED AND TO BE URGED.

The errors assigned and intended to be urged are:

1. The Supreme Court of the State of Mississippi, by its construction of Section 4256, Code of Mississippi of 1906, Section 6887, Hemingway's Code of Mississippi of 1917, Section 8189, Hemingway's Code of Mississippi, of 1927, and by its judgments deprived the principal appellants herein of certain tracts of land, located in the State of Mississippi, the property of said principal appellants, on which the taxes were paid, in violation of and contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, in this, that said court held that said land could be at-

tached and sold for the satisfaction of an alleged personal liability said and held to have been imposed upon said principal appellants, who are non-residents of the State of Mississippi, by reason of the non-payment of taxes on land other than that attached as a personal obligation of said non-resident appellants, although the taxes said and held to have been imposed upon said other land of said non-resident appellants were assessed, if assessed at all, without any summons, notice or appearance of said non-resident appellants, at any time prior to or during the assessment proceedings, and in this, the Supreme Court of Mississippi held that said assessment proceedings constituted, not only a valid assessment of said land in rem, but that said proceedings had the legal and practical effect of imposing a personal liability upon and constituted a judgment against said non-resident appellants, although said non-resident appellants were not summoned and did not appear or otherwise submit themselves to the jurisdiction of the authorities of Mississippi, whose duty it was to make a tax assessment against said other land, and in this, that the Supreme Court of Mississippi held that said personal liability could be and was imposed, estraterritorially, upon said principal appellants, without the service of process, without notice and without otherwise subjecting said non-resident appellants to the jurisdiction of said authorities in so making said alleged assessment, which had the effect of enforcing said statute in contravention of the due process of law clause of said Constitution and of depriving said non-resident appellants of their property which was attached without due process of law.

2. The State of Mississippi does not possess the power to impose personal liability, by its statutes, upon non-residents of the State of Mississippi, for taxes assessed against lands located in said state and owned by such non-residents.

3. Said non-resident principal appellants were denied the equal privileges and immunities of the citizens of the State of Mississippi and the equal protection of the laws of said state, in violation of, and contrary to, Section 2, Article IV and the Fourteenth Amendment of the Constitution of the United States, in this, that under the statutes of said State of Mississippi, all property assessed for taxes is required to be sold at public auction, to the highest bidder for cash, and in default of bids at the sale of said property, whereby the taxes are not paid, said property is required to be sold to the State of Mississippi for the full amount of all taxes, costs and damages incident to said sale, which operates as a discharge of all liability, which course is universally pursued in said state and was pursued with reference to all other taxpayers in said state and in Tunica County, Mississippi, for the same year and under the same assessment, but that the tax collector of said county refused so to sell the land of these non-resident appellants, under the direction of the Attorney General of said State, and in lieu of such sale, this suit was maintained, as against said non-resident appellants, and they were unlawfully selected by said authorities and unlawfully discriminated against by such refusal so to sell said land and to have the benefit of the discharge of said liability for taxes by a sale of their property, although

the property of all other taxpayers was so sold and the liability for said taxes thereby discharged, whereby said non-resident appellants were discriminated against, in violation of the statutes of said state and the aforesaid provisions of the Constitution of the United States, which action on the part of said taxing authorities and the Attorney General of the State of Mississippi, the Supreme Court of the State of Mississippi held not to be violative of said constitutional rights of these appellants, who are, one a resident of the State of California and the other two residents of the State of Tennessee.

4. Although Section 4256, Code of 1906, Section 6887, Hemingway's Code of Mississippi of 1917, Section 8189, Hemingway's Code of Mississippi of 1927, prescribes only a rule of evidence, in providing that an assessment roll shall be only prima facie correct, the Supreme Court of Mississippi has so construed said statute as to make the roll conclusive as a judgment, notwithstanding the fact that it makes no provisions of the means whereby personal jurisdiction of the property owners can be obtained and notwithstanding no such jurisdiction of the principal appellants was obtained prior to or during the proceedings looking to the alleged assessment of said taxes, in that said court held that the due process of law requirement of the Fourteenth Amendment of the Constitution of the United States was met by affording the principal appellants a hearing in the Chancery Court in which the action was commenced, and notwithstanding it is settled by the long and continuous and now effective course of the decisions

of that court, that the chancery courts of said state have not the power to value or assess property or to levy or to collect taxes in said state, which holding that the principal appellants were personally liable for said taxes had the practical, necessary and legal effect to make the assessment roll a conclusive judgment, imposing personal liability for the payment of said taxes, without affording the principal appellants an opportunity to be heard on the questions of the value of the land and of personal liability for said taxes and without having such jurisdiction of the persons of said principal appellants as would, as a matter of law, support and lawfully warrant the imposition of a personal judgment upon them, when said taxes were said to have been assessed, all of which is contrary to, and in violation of, the provisions of said Fourteenth Amendment in that it deprived the principal appellants of their property without due process of law.

STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY.

1. Section 4256, Code of 1906, Section 6887, Code of 1917, Section 8189, declaring taxes to be a debt, as construed by the Supreme Court of the State of Mississippi, is in conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in this, that the Supreme Court of Mississippi held that a certain tract of land owned by the principal appellants located in the State of Mississippi on which the taxes

had been paid could be attached and sold for the satisfaction of an alleged personal liability said and held to have been imposed upon said principal appellants, non-residents of the State of Mississippi, by reason of the non-payment of taxes on land other than that attached, as a personal obligation of said non-resident appellants, although the taxes said and held to have been imposed upon said other lands of said non-resident appellants were assessed, if at all, without any summons, notice or appearance of said non-resident appellants, at any time prior to or during the assessment proceedings; and in this the Supreme Court of Mississippi held that said assessment proceedings constituted not only a valid assessment of said land in rem, but that the proceedings had the legal and practical effect of imposing a personal liability upon, and constituted a judgment against, said non-resident appellants, although said non-resident appellants were not summoned and did not appear or otherwise submit themselves to the jurisdiction of the authorities of the State of Mississippi, whose duty it was to make a tax assessment against said other land; and in this, that the Supreme Court of Mississippi held that said personal liability could be and was imposed, extraterritorially, upon said principal appellants, without the service of process, without notice and without otherwise subjecting said non-resident appellants to the jurisdiction of said authorities in so making said alleged assessment, and in this, that the Supreme Court of the State of Mississippi held that the State of Mississippi possesses the power to impose personal liability by it statutes upon non-residents of the State of Mississippi for taxes assessed

against land located in said state and owned by such non-residents, without providing for notice to or affording opportunity to such non-residents to be heard as to the validity of said assessments.

2. That the Supreme Court of the State of Mississippi, by its judgment and opinion, denies the non-resident principal appellants the privileges and immunities possessed and accorded to the citizens of the State of Mississippi by its laws and the equal protection of the laws of said state, in violation of, and contrary to, Section 2, Article IV, of the Constitution of the United States, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and the Fourteenth Amendment of the Constitution of the United States; in this, that under Chapter 199, Laws of 1908, and Section 4326, of the Mississippi Code of 1906 (Sections 6960 and 6962, Hemingway's Code of 1917, Sections 8245 and 8247, Hemingway's Code of 1927) all property assessed for taxes is required to be sold to the highest and best bidder for cash, and in default of bids at the sale of said property, whereby the taxes are not paid, said property is required to be sold to the State of Mississippi, for the full amount of all taxes, costs and damages incident to said sale, which operates as a discharge of all liability for such taxes, which course is universally pursued in said state, and was pursued with reference to all other property in said state and in Tunica County, Mississippi, for the same year and under the same assessment as the property of the non-resident appellants was had, but that the tax collector of said county refused so to sell

the land of the non-resident appellants, under the direction of the Attorney General of the State, and in lieu of such sale this suit was maintained as against said non-resident appellants, and they were unlawfully selected by said authorities and unlawfully discriminated against by such refusal so to sell said land and to have the benefit of the discharge of said liability for taxes by a sale of their property of all other taxpayers was so sold and the liability for said taxes thereby discharged, whereby said non-resident appellants were discriminated against, and the Supreme Court of the State of Mississippi held such proceedings not to be violative of the Constitutional provisions above mentioned and the rights of the non-resident appellants.

That while Section 4256, Code of 1906 (Section 6887 Hemingway's Code of 1917, Section 8189, Hemingway's Code of 1927) purported to prescribe only a rule of evidence, in providing that an assessment roll shall be only prima facie correct, the Supreme Court of Mississippi has so construed said statute as to make the roll conclusive as a judgment and as imposing personal liability upon a non-resident citizen, although said statute makes no provision of the means whereby personal jurisdiction of the property owner can be obtained prior to or during the proceedings looking to the alleged assessment, in that said Court held that the due process of law requirements of the Fourteenth Amendment to the Constitution of the United States may be met by affording a non-resident property owner a hearing in the chancery court in which the action to collect the personal liability was commenced, notwithstanding it is

settled by the long and continuous and now effective course of the decisions of that court that the chancery courts of said state have no power to value or assess property or to levy or collect taxes in said state, which holding that the principal appellants were personally liable for said taxes had the practical, necessary and legal effect to make the assessment a conclusive judgment, imposing personal liability for the payment of said taxes, without affording them an opportunity to be heard on the question of the intrinsic value of the land, and as related to the assessment of other lands in the county, and without having such jurisdiction of the person of said principal appellants as would, as a matter of law, support and lawfully warrant the imposition of a personal judgment, when said taxes were said to have been assessed, are contrary to and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, and thereby deprived the principal appellants of their property, without due process of law.

ARGUMENT.

One of the attributes of sovereignty is the power to tax; and, although the jurisdiction to exercise that power extends to all persons and property within the bounds of the sovereign and correctly is said to be coterminous with the bounds of the jurisdiction, the power to tax either persons or property beyond the bounds does not exist.

McCulloch vs. Maryland, 4 Wheat, 316.

Cleveland, Painsville & Ashtabula Railroad Company vs. Commonwealth of Pennsylvania, 15 Wall., 300, 21 Law Ed., 186.

The boundary line is the line of sovereignty. Boundary means sovereignty, since in modern times sovereignty is mainly territorial.

Central Railroad vs. New Jersey, 209 U. S., 473 affirming S. C. 70 N. J. L., 81, 56 Atl., 239.

Harvard Law Review, Vol. 32, No. 6, p. 587.

The taxing power of the state cannot reach over into any other jurisdiction to seize upon persons for purposes of taxation.

New York vs. McLean, 63 N. E., 380;

Augusta vs. Kimball, 92 Me., 605, 40 Atl., 666;

State Tax on Foreign Held Bonds, 15 Wall., 300.

No personal obligation can be imposed upon a non-resident to pay a tax levied upon property within the teritorial jurisdiction of the state. The collection of the tax may be enforced by the proceeding in rem, against the property which is the subject of assessment.

Maltby's Case, 199 N. E., 389; *New York vs. McLean,* 57 N. Y., App. Div., 601, 68 N. Y. Supp, 606, 63 N. E., 380; *Pennoyer vs. Neff,* 95 U. S., 714, and cases there cited; *Mexican Central Ry. Co. vs. Pinkney,* 149 U. S., 194, 209.

In *New York vs. McLean*, supra, it is held that, even if a statute were intended to confer upon the officers of the state authority to maintain an action against a nonresident and to impose upon him a personal liability for the payment of the tax assessed, so far as it attempted to confer that power, it was beyond the power of the Legislature to enact, and to that extent invalid.

In *Dewey vs. Des Moines*, 173 U. S., 193, 43 Law. Ed., 665, this Court held that a state statute authorizing an assessment to be levied upon property for local improvement, and imposing upon the lot owner, who is a nonresident of the state, personal liability to pay such assessment, is a statute which the state has no power to enact, as to enforce such personal liability would be a taking of property without due process of law and a violation of the Federal Constitution. In that case, the Court said:

> "In this proceeding of the lot owner to have the assessment set aside and the statutory liability of plaintiff adjudged invalid, the court was not justified in dismissing the petition and giving the contractor, not only judgment on his counterclaim foreclosing his lien, but also inserting in that judgment a provision for a personal liability against the plaintiff and for a general execution against him. Such a provision against a nonresident, although a litigant in the courts of the state, was not only erroneous, but it was so far erroneous as to

constitute, if enforced, a violation of the Federal Constitution for the reason already mentioned."

The chancery court entered a personal decree against the defendants in that court, who occupied the same position as the plaintiff in the Dewey case, and ordered a general execution on the bond releasing the attachment. The State Supreme Court affirmed the decree of the chancery court in this respect.

The character of the tax demanded in the Dewey case was not the governing factor, but the decision turns on the question, whether the assessing authority had jurisdiction of the person at the time assessment was made, the same as in the case of a more formal judgment.

In *Winchester vs. Stockwell*, 74 Atl., 249, the Court held that, though the Dewey case was decided with reference to a betterment tax, the case is equally applicable to any other tax against a nonresident.

The leading case on the point that a nonresident cannot be subjected to the jurisdiction of a court if he is not actually found within the territory, is *Buchanan vs. Rucker*, 9 East, 192. In that case the action was assumpsit on a foreign judgment of an Island Court of Tobago. The record of the judgment showed that upon the filing of the declaration the court ordered a summons to the defendant to appear which was served by nailing a copy of the declaration on the court house door, as in the case at bar, the summons was by publi-

cation. The defendant in the Rucker case had never been on the island nor did he appear by attorney. It was shown that this mode of summoning absentees was warranted by law of the island and was actually practiced there. The English Court refused to recognize the validity of the judgment; and Lord Ellenborough said: "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" Jurisdiction of Courts Over Foreigners, Harvard Law Review, Vol. XXVI, No. 4, page 286.

The same rule prevails, as it must, in Mississippi. In *Columbia Star Milling Company vs. Brand*, 115 Miss., 625, 76 So. 557, it was held that no personal judgment can be rendered against a foreign corporation upon publication of process. In *Boutwell vs. Grayson*, 118 Miss., 80, 79 So., 61, it was held that no valid judgment without valid service of process or an appearance or waiver of process can be rendered. See, also, *Delta Insurance and Realty Agent vs. Fourth National Bank*, 137 Miss., 855, 102 So., 846.

The statutes of Mississippi do not authorize the assessment of nonresidents of the State of Mississippi. Section 8191, Hemingway's Code of 1927, 6891, Hemingway's Code 1917, 4358, Code 1906 provides that, "Every person shall be assessed in the county and in the municipality in which he resides at the time of the assessment." Residence in the state is a prerequisite to a valid assessment of any person, under this statute, and it follows, as night the day, that a nonresi-

dent cannot be assessed at all, so as to impose personal liability. Jurisdiction to tax is limited to an assessment in rem.

In *Adams vs. Colonial & United States Mortgage Company,* 82 Miss., 263, 392, 34 So., 482, the Supreme Court of Mississippi said: "Wherever the money of lender in one state is by the principal entrusted to the control of an agent in another state for the purpose of being deposited in the latter state, and loaned out, collected and re-loaned or habitually kept on deposit, for safety merely, * * so as thus to remain, through a course of dealing so long as to become localized as a part of the whole mass of personal property in the latter state, such money acquired what is known as a business situs for the purpose of taxation."

Thus, it will be seen, that, both by statute and judicial decision, the law of Mississippi is that it has no power to assess either persons or property which are outside of its territorial boundaries. Whether this is a matter of choice or constitutional limitation can make no difference.

In *Union Refrigerator Transit Company vs. Kentucky,* 199 U. S., 194, it was argued that, since the laws of that state protected the corporation, it being domestic, as a consideration for such protection, that state was entitled to tax all of its personal property because it was a creature of the laws of the state. This court held this contention to be based on the out-worn maxim, mobilia sequuntur personam, and did not deem the principle suggested as worthy of direct discussion. The gist

of Justice Brown's argument was, that the power of taxation is based upon the assumption of an equivalent rendered to the taxpayer; and that taxation of property without such an equivalent is a taking of property without due process of law. There can be no possible distinction between the right to tax property which is outside the territorial jurisdiction and the right to tax persons who are outside the territorial jurisdiction.

In Cooley on Taxation, Vol. I, Fourth Edition, Section 94, it is said that a tax on property and rights wholly beyond the confines of the state constitute a taking thereof without due process of law. *Looney vs. Crane Co.*, 245 U. S. 178, 62 L. Ed. 230, 38 Sup. Ct. 85; *Metropolitan Life Ins. Co. vs. New Orleans*, 205 U. S. 395, 51 L. Ed. 853, 27 Sup. Ct. 499; *Delaware, L. & W. R. Co. vs. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077, 25 Sup. Ct. 669; and *Louisville U. J. Ferry Co. vs. Kentucky*, 188 U. S. 385, 47 L. Ed. 513, 23 Sup. Ct. 463, are cited to support the text.

In *International Paper Company vs. Massachusetts*, 246 U. S., 135, 141, 62 Law. Ed., 624, 38 Sup. Ct., 292, Ann. Cas. 1918 C, 617, it is said, that the due process clause precludes a state from taxing property belonging to a foreign corporation which is neither located nor used within the boundary of the state.

In Cooley's Taxation, supra, it is said: "Likewise, state taxation of 'persons' over which the state has no jurisdiction is a deprivation of property without due process of law, where they are made personally liable for the tax".

Section 478, Code of Iowa, 1873, provides that charges for local improvements shall be payable by the owner of the property abutting the street improved and may be collected and the lien enforced by a proceeding at law or in equity, and that it shall be sufficient to declare generally for work and labor done, and materials furnished, against all the owners of the property or any of them, and that such charges, when assessed, shall be payable by the owner personally. The claim against the plaintiff, in Dewey's Case, supra, was based on that statute. The statute involved in the case at bar provides no means to summon the land owner. There is no distinction between a statute which provides a means by which the property owner may be summoned and his liability fixed, but the means is not made use of, and one which provides no such means but which lays down only a rule of evidence, in providing that an assessment roll shall be only prima facie correct, as does the Mississippi statute. If it is conceded, that this rule of evidence can be enlarged by judicial amendment of a legislative act, so as to constitute it a means by which the land owner is afforded a hearing amounting to due process, as was done by the State Supreme Court, the fact remains, that the hearing was not given the appellant at the time the assessment was made. Therefore, the cases are exactly alike and this case must be ruled against the state, as was Dewey's Case against the City of Des Moines and the contractor.

The defendants in the chancery court, the appellants here, did not in any manner consent or render themselves liable to a judgment there, imposing person-

al liability which may be satisfied by a sale of their other Mississippi property on which they had paid all taxes, by appearing in the chancery court and seeking relief from the alleged personal liability and from the attachment. This question is foreclosed in Dewey's Case, supra, in which this Court said:

> "By resorting to the state court to obtain relief from the assessment and from any personal liability provided for by the statute, the plaintiff did not thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability. Nor did the counter-claim made by the defendant contractor give any such authority".

The principle, that property shall not be taken without due process of law, is not varied, because of any difference in the location of property. In Dewey's Case, supra, it did not appear, where his other property was located, if indeed, there was any effort to take it. This rule is not subject to the exception, that property located in other states may not be taken, but that property located in the same state may be sold to satisfy a personal liability which does not exist. All property, wherever located, is protected from confiscation, in the absence of proceedings which amount to due process of law.

In *State Revenue Agent vs. Tonella*, 70 Miss., 701, at page 715, in discussing the question, whether a taxpayer could be subjected to suit before the tax is due by him, which involves making a legal assessment, said:

"But the question is not whether the assessment is conclusive against the citizen when the suit is brought but it is whether he may be subjected to a suit at all unless a tax is due by him at the time, and whether a tax is ever due until an assessment (is) duly made in conformity to the Constitution. Either what the agent does before suit is brought is an assessment of the property, fixing liability for its taxes, which liability is the foundation and support of the suit at law or there is no assessment at all preceding the suit, and the anomaly is presented of an action on a non-existing cause of action, with power in the plaintiff to create, pending the action, the right of action on which the suit rests.

"We are not certain that we appreciate the precise position of counsel. The assumption runs throughout their briefs that a person owning property which has not been assessed is a delinquent who cannot complain of any legislation having for its purpose the taxation of the property. Counsel do not expressly declare that such persons are not entitled to the protection of the constitution, but they suggest that, having failed to obey the law by giving in their property for taxation when all other property was assessed, such delinquent should be left to be dealt with at the discretion of the legislature. But the fact that such persons may have violated the law, either by neglecting or wilfully refusing to return their property for taxation, is no reason why constitutional safeguards, provided for the protection of all classes, should be destroyed

or ignored. The question is not one of policy, but of power; and, if it is competent for the legislature to dispense with an assessment of property as to one class, it would be equally within its power to dispense with it for any or all other classes."

The position finally taken by the Attorney General was to admit that no personal liability was imposed when the assessment was made. The State Supreme Court followed the Attorney General in this view, and held that these property owners could be sued on a cause of action which did not exist and that they must suffer the loss of their property in such a case or have imposed upon them a personal liability which answered the same purpose. Thus, the practical effect of the holding of the State Supreme Court is to take the attached property in the face of the bald proposition that such a taking rests on a non-existent liability.

Section 2255, Code of 1906, 6886, Code 1917, which provides that all taxes assessed shall be a lien upon and bind the property assessed, limits the lien, in this case to the land upon which these taxes were said to have been assessed. This is recognized in the bill, for the complainant undertook to go through the personal liability as a means to reach the lands upon which the taxes were paid, by attaching them and demanding that they be sold to satisfy this liability.

That taxes constitute a lien on no other property than that which is the immediate subject of assessment, has been held by the State Supreme Court in *Anderson vs. State*, 23 Miss., 459, at page 475, and *Bailey vs. Fu-*

qua, 54 Miss., 497, at page 499. See also, Cooley on Taxation, Vol. IV, (Fourth Edition) Sections 1230 and 1235.

Section 4326, Code of 1906, 8245, Hemingway's Code 1927, and Section 6962, Hemingway's Code of 1917, 8247, Hemingway's Code of 1927, which prescribes the manner in which land shall be sold for the delinquent taxes thereon, and make it the mandatory duty of the tax collector of the county to sell the land of delinquent taxpayers, or so much or such parts thereof as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash. The attorney general entered into an agreement with the tax collector, R., 38, whereby the tax collector refused to perform his mandatory duty in the face of the fact that it is the universal custom in the State of Mississippi to make sales of land on which default in the payment of taxes has been made on the first Monday in April of the year after assessment of taxes, and that on the first Monday of April 1929 all such lands were sold and those of every other taxpayer in Tunica County were so sold, which sale resulted in discharging personal liability of every other taxpayer in the State of Mississippi, if any such liability existed. The excuse given for this discrimination against the appellants here, was that their lands were the only lands in Tunica County, delinquent for taxes, from which the merchantable timber had been removed between the date of the assessment and the date set for the tax sale. A sufficient answer to this is, that the appellants had the absolute right to remove the timber from their lands in a drain-

age district, regardless of what their purpose was, as was said in the opinion of Justice Anderson, R., 59. An honest misconception of the law on the part of the attorney general and tax collector can furnish no ground for discrimination.

In *Carrier Lumber & Manufacturing Company vs. Quitman County*, 156 Miss., 396, 124 So., 437, 125 So., 416, the Supreme Court of Mississippi held, that a sale of land for taxes discharged the personal liability of the owner, and that thereafter there was no personal debt on which an action could rest. It follows, therefore, that if this duty had been discharged and these appellants had been given the benefit of the sale, the debt would have been paid. It appears, therefore, that the policy of the law of Mississippi is to stop at confiscation of the property against which taxes are assessed.

In *Yazoo Delta Mortgage Company vs. Lumbley*, 116 So., 95, 149 Miss., 864, at page 872 of the state report the Supreme Court held that Section 6103, Hemingway's Code 1927 is an important statute designed to protect both the state and the land owner, and that, if a sale for less than the amount of taxes, damages and costs can be made, it would be highly prejudicial to the owner, for the reason that the lands might be put up and sold for a mere fraction of the taxes due, leaving a personal debt due by him to the

state, which could be collected by judgment and execution, as a debt due by the taxpayer to the state under Section 4256, Code of 1906, Hemingway's Code 1927, Section 8189, under which the present action was brought by the attorney general.

Section 6103, supra, reads as follows: "If, upon offering the land of any delinquent taxpayer, constituting one tract, no person will bid for it the whole amount of the taxes and all costs, the collector shall strike off the same to the state, and he shall, on or before the first Monday of May thereafter, transmit to the land commissioner a certified list of the lands struck off by him to the state, specifying the day of sale and the amount of taxes for which the sale was made, and each item of cost incident thereto, and the land commissioner shall correct the list, if necessary, by the records of his office and of the United States Land Office, and strike from it land improperly on it, and return it to the collector for correction, if necessary, and the collector shall correct it as instructed by the land commissioner and return it to him as corrected.

> "And when the list is corrected it shall be recorded in the land commissioner's office and shall then be certified by the land commissioner and be transmitted to the clerk of the chancery court of the county, and be by him recorded in a book kept for that purpose."

If the land of a delinquent taxpayer is purchased by an individual, of course, the debt is paid. If no

such sale can be made, the statute makes the state a purchaser at the same price, and with the same result.

In *Yick Wo vs. Hopkins,* 118 U. S. 356, 374, 30 Law. Ed., 220-228, this Court held that it was not obliged to reason from the probable to the actual and pass upon the validity of an ordinance, as tried merely by the opportunities which the terms afford, of unequal and unjust discrimination in their administration; that the cases then under consideration presented the ordinances in actual operation, and the facts shown established an administration directed so exclusively against Chinese as to warrant and require the conclusion that whatever may have been the intent of the ordinances, they were applied by the public authorities charged with the administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to all persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United Sates; and that, though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authorities with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

It is submitted, that no clearer case of unconstitutional discrimination can be conceived than is pre-

sented by the conduct of the attorney general and the county tax collector against these taxpayers.

The extent of the power of the chancery court of Tunica County was to determine judicially, the questions, whether the tax assessment was lawfully made, whether proper value had been set, whether the value had been equalized in relation to the property of other taxpayers, whether a proper levy had been made, and also whether personal liability for the payment of the taxes had been imposed, all of which acts must have been performed by the county tax collector and the board of supervisors of the county.

In *Colbert vs. State*, 86 Miss., 769, it is said that under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function, indeed the supreme legislative prerogative, indispensable to the integrity of the legislature and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberty of the people.

In *Adams, Revenue Agent, vs. Tonella*, 14 So., 14, 70 Miss., 701, at page 716, it is said: "It is not too much to say that, if it were possible for one man to perform the duties of the office of revenue agent according to the provisions of the code, there are not enough courts in all states to determine in a life-time the suits which would be brought in one year. But it is obvious that no purpose is disclosed of preserving the rule of uniformity and equality prescribed by the

constitution. The evident purpose is to vest power in the agent to sue in the most flagrant instances of undervaluation of property heretofore taxed, or of non-assessment. Each case stands separate and distinct from each other, and, in lieu of the local agencies provided by the constitution, with local tribunals for equalization of values, the scheme of the act is to vest unlimited power and discretion in a state officer, with a trial by jury in each suit to finally settle the question of valuation. This is a total departure from the scheme of the constitution, and it is therefore invalid."

In that case the State Supreme Court held that assessment for taxation can be made only by the officer designated by law, and where the Constitution devolves the duty of assessing upon a certain officer, the Legislature cannot substitute another; that the Constitution of 1890, Section 112, in requiring that taxation shall be uniform and equal and that assessment for taxation shall be under general laws and by uniform rules, according to value, contemplates that such assessment shall be made by the assessor provided for by Section 138 thereof, selected for each county, and having the well known functions that have heretofore pertained to that office; and that a statute which provides that the revenue agent may assess for advalorem taxes property within the state that has escaped taxation, and may collect the taxes thereon, is a departure from the constitutional scheme of securing uniform and equal taxation through assessment by local assessors in each county, and is, therefore, unconstitutional.

Assessment is there held to be the listing and valuation of property liable to taxation, according to law, and that it is essential for the apportionment of all advalorem taxes.

The holding in that case was followed by the State Supreme Court in *Johnston vs. Puffer Manufacturing Company* 111 Miss., 240, and in that case, the Court held that the chancery court had no power to assess and equalize taxes.

In *Knox, Attorney General, vs. Southern Paper Company,* 143 Miss., 870, 108 So., 288, it was held that, if in assessing property for taxes either requirement in the Constitution of 1890, Section 112, that property be assessed at its true value, or that the requirement that its assessment be uniform and equal, is to be sacrificed, it must be the requirement as to value and not the requirement as to uniformity and equality, as otherwise, it would deprive the taxpayer of the equal protection of the law guaranteed by the Federal Constitution, Amendment Fourteen. It was there held, also, that it is a matter of common knowledge, that assessing officers of this state systematically and universally assess property at a lower level than its true value.

In *Preston vs. Sturgis Milling Company,* 183 Fed., 1, it is held to be a fundamental principle that the power of taxation is legislative and cannot be exercised otherwise than under legislative authority, that the scope of the principle is that each step in the process of taxation from beginning to end can be taken only as the legislature may prescribe; that the courts may exercise the power of taxation in respect to any of

such steps only when, and to the extent, the legislature has so provided. It is there said, that even where there has been an assessment and levy of the tax so that the amount due from each taxpayer is exactly ascertainable, in the absence of legislative authority, a court has no power to collect the tax and pay it over to the party entitled thereto. Numerous decisions of the Supreme Court of the United States are cited to support what is there said to be a fundamental principle of jurisprudence, settled beyond question.

In the opinion of Justice Anderson, who wrote one of the majority opinions, R., 53, he cites *George County Bridge Company vs. Catlett*, 161 Miss., 120, 135 So., 217, to support his opinion in the case at bar in respect to the requirement of due process, and says, R., 56, that the taxpayer is given his day in court on that issue by the last clause of the statute, which provides that in an action to recover advalorem taxes, the assessment roll shall only be prima facie correct, but Justice Anderson destroyed his own theory, R., 58, when he said that it is true, that in the Delta & Pine Land Company case, which he had cited and in the George County Bridge Company case, the taxpayer had appeared before the board of supervisors and contested their assessments, before the suits were brought. It may be true, as there stated, that the taxpayer in those cases had two hearings on the issue of the valuation of their property. One hearing is sufficient, on the questions of value, equalization and personal liability for the tax imposed, but the thing that is fatal to this case, is that these taxpayers had no hearing at all on these questions.

Justice Anderson in *George County Bridge Company vs. Catlett,* supra, cited *McMillan vs. Anderson,* 95 U. S., 37, 24 Law. Ed., 335, to support his holding in the bridge company case. He relied on the statement made by the Justice who wrote the opinion in the McMillan Case that a statute which gives the taxpayer the right to enjoin the collection of the tax charged against him, and to have the validity of such tax decided by the court, furnishes the taxpayer due process of law, notwithstanding the statute requires that the taxpayer give security in advance as in other injunction suits.

That case did not involve an assessment, but involved the question of liability for the payment of a privilege tax which was imposed by the statute and became due when the person sought to be charged engaged in the business taxed, which necessarily constituted submission to the jurisdiction of the state, for purposes of taxation of the person.

From the report of the McMillan Case in the Lawyers Edition of the United States Supreme Court reports a clear understanding of what was held by that court cannot be had. An examination of the case as reported in 95 U. S., 37, will show, in the statement of the case, which is eliminated in the Lawyers Edition, that two statutes of the State of Louisiana were involved, the

first being the Revised Statutes of Louisiana, Section 2779, which imposed, without the neceessity of an assessment, a privilege tax on retail merchants and liquor dealers, on the merchants, a tax of $15.00, and an additional tax of $85.00 on proprietors of coffee-houses, beer saloons or gardens, or cabarets, making the $100.00 involved in that suit.

The second statute was the Act of the Legislature of Louisiana, approved March 14, 1873, and it prescribed the procedure by which the tax should be collected. Liability for the payment of taxes such as are involved in the case at bar must be imposed by the act of making an assessment by the proper authorities and in the manner prescribed by law.

When one engages in a business which is taxed if he engages in it in the taxing state, jurisdiction is acquired, because the liability was incurred by the voluntary act of the taxpayer, done within the territorial jurisdiction. But the right to acquire title to and own property is not taxed or taxable in Mississippi, nor do these acts confer jurisdiction on the state over the person of the owner. In such cases, the property is taxed and the liability is imposed by assessment.

The amount of the privilege tax was fixed by the statute, itself, and the liability for its payment was incurred by McMillan when he engaged in the business taxed. In determining his liability, one question only

was involved, that is, Did he sell merchandise at retail and operate a coffee house, beer saloon or garden or cabaret?

The suit was for damages for a trespass which he alleged had been committed, and for an injunction against further trespass. The notice prescribed by the Act of March 14, 1873, had nothing to do with the assessment of the tax, but was a necessary prerequisite to the right to collect by seizure and sale of the property of the taxpayer who was delinquent. It will be observed that the notice was given to those who had neglected or refused to pay their licenses for which liability had been incurred by the act of engaging in the business taxed. The notice had nothing to do with the imposition of the tax, that is, with an assessment. See the language of the Act, quoted at page 37 of the Official Report.

The liability was imposed by Section 2779 of the Revised Statutes, part of which is quoted at page 39 of the Official Report. The tax is levied by the Act, not assessed. The head note is confusing. There is no assessment involved.

Attention is invited to the fact, that no question of personal liability was involved. Since no assessment was made in that case, the language of the Court, so far as it discussed assessments, is obiter dictum. Personal notice to the taxpayer is not necessary to the validity of an assessment in rem, but it is an indispensable prerequisite to the imposition of personal liability for the payment of taxes.

The defense made by the tax collector was affirmative. He confessed the seizure, but pleaded that the plaintiff was a tax delinquent and that it was his, the tax collector's, duty to collect the tax, which justified the seizure. A full hearing was had and the defense was sustained. See the first paragraph of the opinion, page 40 of the Official Report. But one issue was involved, whether the plaintiff had been engaged in the business taxed. He was heard on the issue and it was decided against him. Thus, his property was not taken without giving him an opportunity to be heard, and the requirement of due process of law was met.

It will be observed that the United States Supreme Court declined to review this part of the proceedings of the courts of Louisiana, but planted its decision on the statute relating to procedure looking to the collection of the tax. The court held that the question of liability was settled by the courts of Louisiana when the question of fact, as to engaging in the business, was settled. See page 41 of the Official Report.

After that, the only question to be determined was whether the statute relating to procedure looking to the collection of the tax violated the due process provision of the Federal Constitution. The right to resort to the method prescribed depended on the determination of the question of the liability. Liability having been established, the statute which provided for notice, seizure, advertisement of the property and subsequent sale of it did not violate the due process provision and this is all the opinion decides.

The decision in *George County Bridge Company vs. Catlett* is based on the proposition, that the due process requirement is met because the taxpayer may resort to an injunction against the collection of an unlawful tax, citing the McMillan case as authority. The right to recover in the case at bar depends on the validity of the assessment. No tax is due until a legal assessment imposing personal liability is made. Neither the amount nor the personal liability can be fixed in any other way, since the tax is not imposed by the naked fact of ownership.

Wells, Fargo & Company vs. Nevada, 248 U. S., 165, 63 Law. Ed., 190, was relied on by the complainant and the Court decided the case on it as authority. The very elements that are absent in the case at bar, of which complaint is made, were present in the case. The action was brought under Sections 3659 to 3665, inclusive, of the Revised Statutes of Nevada of 1912. These statutes provided a very elaborate scheme for notice to the taxpayer, a hearing on valuation, equalization and levy and they were used as the means to impose personal liability. The case is not in conflict with the decision of this Court in the Dewey Case.

The complaint in the Wells, Fargo Case was against the imposition of the tax on the property which constituted the direct subject of taxation, and not against the consequence of the imposition of a personal liability resulting in a subsequent subjection of other property to the satisfaction of the judgment imposing personal liability. In the Dewey Case and in the case at bar, the complaint is against taking property which

was not the immediate subject of the tax assessment and levy, in the case at bar, the attached land. There is no contention here, that personal liability cannot be imposed, if jurisdiction of the person is acquired, as in the Wells, Fargo Case, but the complaint here is that no jurisdiction was acquired. In the adoption of the statutes of Nevada, the legislature of that state recognized the constitutional requirement that notice be given before the tax became final. In the case at bar, the Supreme Court of Mississippi undertook to dispense with this constitutional requirement, in holding, that these appellants could be brought into court on a cause of action which did not exist, and could thereafter have personal liability imposed, because they answered, correctly, that the State of Mississippi had no right to subject their property to the payment of a debt which did not exist. In Mississippi, the assessment is made final when the roll is approved by the board of supervisors and the state tax commission. R., 21, 22 and 23. *Wilkinson County vs. Foster Creek Lbr. & Mfg. Co.*, 135 Miss., 616, *Moller-Vandenboom Lumber Company vs. Board of Supervisors*, 99 So., 823, 135 Miss., 249, same case, 138 Miss., 289, *State vs. Wyoming Mfg. Co.*, 138 Miss., 249, and *Grenada Bank vs. Town of Moorhead*, 160 Miss., 163, 133 So., 666.

Parker vs. Rising Sun Street Lighting Company, 299 Mass., 498, 118 N. E., 871, and *Greenbaum vs. Commonwealth*, 147 Ky., 450, 144 S. W., 45, Ann. Cas., 1913D, 338, are cited to support one of the majority opinions written by Chief Justice Smith, R., 76.

In the first named case, personal liability of a foreign corporation was sustained on the following grounds:

1. The Corporation maintained an office, workshop and storehouse and conducted its business within the territorial jurisdiction of the Commonwealth of Massachusetts, and it was presumed, therefore, to have complied with the law of that commonwealth which required the appointment of agents for the service of process and other purposes, so that it was authorized to do business there. This conferred jurisdiction over it as a person.

2. That commonwealth had and exercised the power to dictate the terms and conditions upon which the right to do any intrastate business, which business the corporation transacted.

3. No such corporation can accept the benefits open to it on certain conditions and complain that the establishment of personal liability for taxes would deprive it of its property without due process of law.

In the case at bar, the appellants were not located within the territorial limits of Mississippi, had no office or workshop there and have not been shown to have transacted any intra-state business there. No conditions are attached to ownership of land by non-residents in Mississippi. Since there are no conditions, there can be no benefits growing out of conditions, and it follows that estoppel against complaint that to render personal judgments against them without jurisdiction

of the person is to deprive them of their property without due process of law, does not apply. The contention was that the power to tax a nonresident could not be exercised. No contention was there made, that the taxing authorities had no jurisdiction of the person of the corporation when the assessment was made. The corporation challenged the power to impose personal liability under any circumstances. In the case at bar the power to impose personal liability on a nonresident if he is summoned, is not challenged, but it is contended, that no jurisdiction over the person of the appellants was acquired which will support a personal judgment.

In the case at bar, no summons was issued, no appearance was made and the defendants did not submit to the jurisdiction of the assessing authorities at any stage of the proceedings, and the bill itself, is predicated upon the fact, that the taxpayers were nonresidents. The assertion of jurisdiction in the trial court negatives the jurisdiction of the assessing authorities to impose personal liability in the absence of personal notice or an appearance at some stage of the assessment proceedings.

In *Greenbaum vs. Commonwealth,* 147 Ky., 450, 144 S. W., 45, Ann. Cas., 1913D, 338, the court held that the power of the state, as to form and extent of taxation, is unlimited, unless restrained by the Federal Constitution, where the subject to which it applies is within its jurisdiction.

The courts of Kentucky have power to render a personal judgment against a nonresident for the amount of the tax assessed on whiskey stored in his warehouse, where they have obtained jurisdiction of the person of the nonresident by personal service of process within the state, and where such nonresident appeared without protest in the proceedings leading up to the assessment, and made reports required by law, showing the kind and quantity of spirits in his custody as warehouseman. That case presented the proposition, that a taxpayer cannot be subjected to personal liability for taxes on account of the fact, alone, that he is a nonresident of the state.

The answer of the taxpayer in that case admitted an appearance, as set forth in the head note to the case, the substance of which has been stated above, but pleaded in avoidance, that the appearance was involuntary, in answer to the allegation in behalf of the commonwealth, that he voluntarily submitted himself to the jurisdiction of its laws in appearing during the assessment proceedings, thus aiding in bringing about the assessment of the whiskey upon which the tax was subsequently levied. In the case at bar, there is no pretense that the appellants here appeared or otherwise submitted themselves to the jurisdiction of the State of Mississippi.

In Greenbaum's Case, it is said, at page 340 Ann. Cas. 1913D, that the appeal raises no question of personal service upon him, since he was so served while in the state, and that the state contended that *Dewey*

vs. Des Moines, 173 U. S., 193, 19 S. Ct., 379, 43 Law. Ed. 665, and *New York vs. McLean,* 70 N. Y., 374, 63 N. E., 380, were not applicable and did not control, since Greenbaum voluntarily appeared in the proceedings leading up to the assessment of the tax, thus bringing himself within the "letter and spirit of *Dewey vs. Des Moines,* supra, in which stress was laid upon the fact that Dewey had given no consent which amounted to an acknowledgment of the jurisdiction of the city or common council over his person.".

It is said, at page 341, Ann. Cas., 1913D, that Greenbaum offered to confess judgment for part of the tax. After stating the facts to be materially different, the court pointed out the material and controlling difference as being that, in Dewey's Case, the assessment was in the nature of a judgment rendered against him by reason of the assessment alone, but that in Greenbaum's Case it was not contended that the assessment had the effect of a judgment.

McLean vs. New York, 170 N. Y., 374, 63 N. E., 380, is disapproved in Greenbaum's Case, but only so far as it held the New York statute not to apply to non-residents so as to impose personal liability for the payment of taxes. The contention in the case at bar is not that personal liability cannot be imposed upon a non-resident under any circumstances, but that it was not imposed upon the appellants when the assessment was made and that, in seeking relief from the alleged personal judgment they did not thereby submit themselves to the jurisdiction of the chancery court or the supreme

court of Mississippi so as to authorize the imposition of such a judgment by either of those courts.

Bristol vs. Washington, 177 U. S., 133, 44 Law Ed., 701, does not support the position taken by the State of Mississippi or in the opinion of the Supreme Court of that state in the case at bar. What was there held was that the personal property of a citizen of and resident in, one state, invested in bonds and mortgages in another state, is subject to taxation in the latter state; and the amount of the tax is a claim against the property of the person taxed which is a debt that may, in case of death of the person taxed, be proved against his estate in the state and whether the mortgages contracted are subject to the statutes of limitations of the state. The appeal was from a judgment allowing a claim against the estate which was the direct subject of tax, not from a personal judgment imposed without notice or an appearance. Jurisdiction over the estate arose out of the fact that the bonds and mortgages had a situs in Minnesota.

There is no contention in the case at bar, that the taxing authorities of the State of Mississippi had no jurisdiction of the land which constituted the direct subject of taxation. The validity of the assessment and levy was attacked in the state courts, but these issues were decided against the appellants and the state court decisions are conclusive. Jurisdiction to tax the land was never denied.

The decision in the Bristol Case, supra, was rested on the rule, that personal property may be taxed where it is situated, without reference to whether the owner is a citizen of, or resident in, the state which imposes the tax. One of the contentions in the case was that the assessments did not constitute judgments in personam, that the power to tax could be exercised only as against the very property taxed and that judgment could not, therefore, be rendered against the decedents' estate upon such personal judgments. The state did not recover on the assessments as personal judgments, but rested its claim on one statute directing payment out of the estate of taxes in preference to ordinary debts. The court, for that purpose so treated the taxes, but not as being debts in the usual acceptation of the term. The claim rested, also, upon another statute of Minnesota making the taxes assessed upon personal property a lien upon all the personal property of the person assessed. See Section 1623 Gen. Stat. 1894 (Gen. Stat. 1878, C. 11, Sec. 105), and the Official Reports of the Supreme Court of the United States, Volume 177, at page 146.

In that case the only defense on the merits was the want of situs. This issue was decided against the taxpayer, which sustained the jurisdiction and was that on which it rested. If the property had had no situs in Minnesota, the tax could not have been imposed against it and, consequently, there would have been no claim to probate against the estate.

But in the case at bar, the jurisdiction of the court in the attachment suit depended upon the fact, that the appellants were nonresidents, which fact puts beyond controversy the proposition, that no jurisdiction over a nonresident to support an assessment as a personal judgment can be acquired without notice or a constitutional substitute for it. The existence of the necessary jurisdictional fact to support the attachment suit rendered void the alleged personal judgment growing out of the assessment.

It is respectfully submitted that the judgment of the Supreme Court of Mississippi herein complained of should be reversed and judgment entered here for the appellants.

W. E. GORE,
GEO. BUTLER,
Attorneys for Appellants.

I hereby certify that I have this day delivered to Mr. E. C. Sharp, Jackson, Mississippi, Attorney for the Appellee, a true copy of the foregoing brief.

Witness my signature this December 2, 1933.

W. E. GORE,
Of Counsel for Appellants.

APPENDIX

Hemingway's Code 1927.

"8189. Taxes a Debt Recoverable by Action. Every lawful tax levied or imposed by the State, or by a county, city, town, village, or levee board, is a debt due by the person or corporation owning the property or doing the business upon which the tax is levied or imposed, whether assessed or properly assessed or not, and may be recovered by action; and in all actions for the recovery of taxes the assessment roll shall be only prima facie correct."

"8245. Sale of Land for Taxes—Advertisement. After the fifteenth day of January the tax collector shall advertise all land in his county on which the taxes have not been paid, or which is liable to sale for other taxes, for sale at the door of the courthouse of the county on the first Monday of April following; such advertisement shall be inserted for three weeks in some newspaper published in the county, if there be one, but in counties having two court districts the land shall be advertised and sold in the district in which such lands are situated, and be put up at the courthouse door, and shall contain a list of the lands to be sold in numerical order as they are contained in the assessment roll, in substance as follows: * * * *."

"8247. How Sale Made.—On the first Monday of April, if the taxes remain unpaid, the collector shall proceed to sell the land, or so much and such

parts of the land, of each delinquent taxpayer, as will pay the amount of taxes due by him, and all costs and charges, to the highest bidder for cash. He shall first offer forty acres, and if the first parcel so offered do not produce the amount due, then he shall offer another until all the land constituting one tract and assessed as the property of the same owner be offered. The sale shall be continued from day to day within the hours for sheriff's sale until completed; but neither a failure to advertise nor error in advertisement, nor error in conducting the sale, shall invalidate a sale at the proper time and place for taxes, of any land on which the taxes were due and not paid; but a sale made at the wrong time or at the wrong place shall be void. And any person sustaining damage by reason of any failure or error of the tax collector may recover damages therefor on his official bond".

Hemingway's Code 1917.

"6886. Taxes a lien, from what date.—Taxes, both state and county, assessed upon lands or personal property, shall bind the same, and be entitled to preference over all judgments, executions incumbrances, or liens, whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed, from the first day of February of the year in which the assessment shall be made; and no property shall be exempt from distress and sale for taxes. And it shall not be necessary to the validity of an assessment, or of a sale of land for

taxes, that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest title in the purchaser, without regard to who may own the land or other property when assessed or when sold, or whether wrongfully assessed, either to a person, or to the state, or any county, city, town, or village, or subdivision of either."